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No. 89-1378

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

AVRAM MACY KLAVAN, PETITIONER

v.

GARRIE JOAN KLAVAN, RESPONDENT

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

REPLY BRIEF FOR THE PETITIONER

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out in our petition for certiorari (at 9-10) that the issue in this case is virtually identical to the issue presented in Burnham v. California Superior Court, No. 89-44, which has been briefed and argued and is pending decision by this Court. The only difference between the present case and Burnham is that in Burnham the defendant had made several recent visits to the forum state before being served with process. Here, the unfairness of predicating jurisdiction upon the fortuity of service within the state is brought into even sharper focus because petitioner was served during his first contact with the forum state in 20 years. 1/

1/ Respondent suggests (Br. in Opp. 4) that in the time leading up to institution of the divorce action petitioner had travelled to Massachusetts on more than the one occasion during which he was (Cont'd)

Because the instant case presents the same issue that this Court will decide in Burnham, we suggested in the certiorari petition that the Court hold this case for disposition in light of its decision in Burnham. Respondent does not seriously contend that the issues presented here and in Burnham are different. Instead, she asserts that there are procedural reasons why this Court should refuse to take even the modest action of holding this case pending its decision in Burnham, and she makes the rather ironic -- but, in any event, irrelevant -- complaint that granting relief here would enable petitioner to engage in forum shopping. As we now show, however, none of these contentions warrants the extreme

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served. Respondent cites only her own trial court brief for this proposition. Nothing in the record bears out the assertion.

action of denying the petition outright, as respondent urges.

1. Respondent first argues (Br. in Opp. 7) that the issue presented here was not raised in the courts below. While we do not deny that the issue could have been framed more clearly in the lower courts, petitioner plainly did object to the trial court's exercise of personal jurisdiction generally and, in particular, insisted that he did not have the number or kind of contacts with Massachusetts necessary to justify the exercise of jurisdiction.

For example, in his memorandum in support of the motion to dismiss (at 5), petitioner asserted that a "'functional or pragmatic consideration about the comparative advantages of one forum over another * * * tends to become determinative of the constitutional question

itself,'" (quoting Doe v. Roe, 377 Mass. 616, 619, 387 N.E.2d 143, 145 (1979) (emphasis added)). Relying on that proposition, petitioner proceeded to argue that the relevant pragmatic considerations -- that Massachusetts had never been the couple's marital domicile, that the couple's property was not located in Massachusetts, that the couple's business enterprises were not located in Massachusetts, and that the couple's children resided outside of Massachusetts -- compelled the conclusion that it would be inappropriate for the Massachusetts courts to exercise personal jurisdiction. Id. at 5-6.

In his opening appellate brief, petitioner reiterated that he lacked the kind of contacts with Massachusetts necessary to justify personal jurisdiction. Citing Kulko v. Superior Court,

436 U.S. 84 (1978), one of this Court's many cases enunciating the constitutional requirement of minimum contacts, petitioner stated: "Personal jurisdiction depends upon the presence of notice to the defendant and a sufficient connection based upon minimum contacts between the defendant and the forum State to require a defense of the action in the forum State." Br. in Opp. App. 4a. He continued:

> Jurisdiction under the long-arm statute * * * is not applicable in this action. The parties did not maintain a marital domicile in Massachusetts at any time * * * and nothing in the record suggests [petitioner] ever transacted any business in Massachusetts (except for the day he was served with process) to warrant a finding that he had sufficient minimum contacts with Massachusetts to assert jurisdiction under [the long-arm statute's "transacting business" provision].

Id. at 5a n.2.

Thus, respondent is simply wrong in asserting (Br. in Opp. 7) that "[t]he question of whether the Husband had sufficient minimum contacts with Massachusetts is raised for the first time in this appeal." Respondent predicated personal jurisdiction over petitioner solely on his presence in the Commonwealth at the time of service. By objecting to the sufficiency of his contacts with Massachusetts, petitioner plainly was contending that the mere service of process was inadequate to satisfy due process. No greater clarity was required under this Court's precedents. See, e.g., Illinois v. Gates, 462 U.S. 213, 220 (1983) ("'[i]f the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for

alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued'") (quoting Dewey v. Des Moines, 173 U.S. 193, 197-198 (1899)); Braniff Airways, Inc. v. Nebraska State Bd., 347 U.S. 590, 599 (1954) ("appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented").

2. Respondent next argues (Br. in Opp. 8) that petitioner consented to the trial court's jurisdiction by participating in discovery and trial after the

court denied the motion to dismiss. 2/ She suggests that the only ways that petitioner could have preserved his objection to personal jurisdiction were (1) to refuse both to participate in discovery and to appear for trial, and suffer a default judgment as a result; or (2) to seek a stay of the proceedings and file an interlocutory appeal.

This argument is severely misguided for several reasons. First, the Massachusetts Supreme Judicial Court obviously did not view the issue as

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2/ Respondent contends (Br. in Opp. 8) that the equal division of a tax refund between the parties sometime after entry of the divorce judgment also indicates that petitioner had somehow consented to the court's jurisdiction. Aside from being nowhere in the record, the mere fact that the parties may have divided a tax refund equally quite obviously has no bearing on whether petitioner consented to the jurisdiction of the Massachusetts courts.

having been waived. To the contrary, the court below considered this case important enough to transfer to its own docket before the Appeals Court had even considered it, and then after hearing argument it reached the merits of petitioner's personal jurisdiction objection. Since waiver was of no moment to the state court, it should not concern this Court either.

Second, Rule 12(b) of the Massachusetts Rules of Domestic Relations Procedure, which is essentially identical to Rule 12(b) of the Federal Rules of Civil Procedure, expressly provides that "[n]o defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." This provision eliminates the need to appear specially to challenge a court's jurisdiction and

ensures that parties can defend on the merits without waiving jurisdictional objections. See 5 C. Wright & A. Miller, Federal Practice & Procedure § 1344, at 521-524 (1969).

Third, the Supreme Judicial Court expressly rejected respondent's very argument over 70 years ago, holding that a defendant did not waive his objection to personal jurisdiction by filing an answer on the merits and participating in discovery after the trial court refused to allow him to appear specially to challenge jurisdiction. The court stated: "[T]his contention cannot be supported. After having raised the point seasonably, [defendant] did not waive it by proceeding in accordance with the rulings of the court, which until reversed were the law of the trial." Cheshire Nat'l Bank v. Jaynes, 224 Mass. 14, 19-20, 112 N.E.

500, 503 (1916). 3/ See also Cohn v. Carlisle, 310 Mass. 126, 129, 37 N.E.2d 260, 263 (1941) ("A defendant cannot for the first time complain of defective service of process after he has partici-

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3/ The cases cited by respondent do not alter this holding. In Leffler v. Todd, 316 Mass. 227, 55 N.E.2d 767 (1944), the defendant-intervenor attempted to appear specially to obtain a determination of his right to certain disputed funds, but at the same time he sought an adjudication that the plaintiff had no cause of action against him. The Supreme Judicial Court stated: "We do not think that one specially appearing as a claimant can seek an adjudication of the plaintiff's claim against himself as a defendant and general relief without submitting personally as a defendant to the jurisdiction of the court." Id. at 232, 55 N.E.2d at 769. The situation in Leffler is thus plainly different from cases like Jaynes and the present one in which a defendant appears for the sole purpose of contesting jurisdiction and proceeds to litigate the merits of the case only after his motion to dismiss is denied.

Bateman v. Wood, 297 Mass. 483, 9 N.E.2d 375 (1937), is even less apposite than Leffler. In Bateman, the defendant entered a special appearance to contest (Cont'd)

pated in a hearing upon the merits.") (emphasis added).

This Court also has expressly rejected respondent's argument, stating:

> The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground * * *; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not

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the adequacy of service. The Supreme Judicial Court pointed out that had the defendant made a general appearance, she would have lost the right to contest service, but, because she entered a special appearance, her right was preserved. Bateman says absolutely nothing about the effect of litigating a case after the trial court has issued an unfavorable ruling on a challenge to personal jurisdiction.

> considered as aban]doning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting on the illegality, that the objection is deemed to be waived.

Harkness v. Hyde, 98 U.S. 476, 479 (1879).

Finally, respondent's contention is contrary to sound judicial policy because it is irrational to encourage, let alone require, defendants to take interlocutory appeals. Massachusetts, like all other jurisdictions, disfavors such appeals because they are burdensome and inefficient. See, e.g., Mood v. Kilgore, 384 Mass. 459, 462, 425 N.E.2d 341, 343 (1981); Cappadona v. Riverside 400 Function Room, Inc., 372 Mass. 167, 169, 360 N.E.2d 1048, 1050 (1977).

In sum, respondent's suggestion (Br. in Opp. 8 (citation omitted)) that

petitioner "'purposefully availed [himself] of the privilege of conducting activities within'" Massachusetts by defending himself at trial is ludicrous. Petitioner did not choose to be sued in Massachusetts; it was respondent who brought suit there. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." Hanson v. Denckla, 357 U.S. 235, 253 (1958). See also Kulko, 436 U.S. at 93-94.

3. Respondent also asserts (Br. in Opp. 9) that the relief we seek in the petition would be unreasonably burdensome for her. She accuses petitioner of engaging in "forum shopping" and complains that she should not have to relitigate her divorce action in the courts of another state.

This argument is remarkable, given that it is respondent who engaged in forum shopping by suing petitioner in a jurisdiction with which he had not the slightest contact. Moreover, the question before this Court is simply whether the "minimum contacts" analysis applies when the defendant is served in the forum state, an issue as to which the hardship to any particular plaintiff is plainly irrelevant. If the Court holds in the affirmative in Burnham, it need only remand this case to the Massachusetts courts for reconsideration in light of that decision. It then will fall to the Massachusetts courts to determine whether petitioner's contacts with the Commonwealth were sufficient to justify the exercise of jurisdiction. The hardship to respondent is arguably relevant to that determination, although "the burden

on the defendant" remains the "primary concern." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (emphasis added).

For the foregoing reasons and for the reasons stated in the petition, the petition should be held for disposition in light of the Court's decision in Burnham.

Respectfully submitted.

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